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No. 00-596

In the Supreme Court of the United States

LORILLARD TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; R.J. REYNOLDS TOBACCO COMPANY; PHILIP MORRIS INCORPORATED; AND UNITED STATES TOBACCO COMPANY,

Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that Massachusetts regulations that sharply limit the public display of cigarette advertisements do *not* impose prohibitions "with respect to the advertising or promotion" of cigarettes within the meaning of the preemption provision of the Federal Cigarette Labeling and Advertising Act.

2. Whether Massachusetts' prohibition on virtually any public display of truthful and nonmisleading tobacco advertisements violates the First Amendment, either under the strict scrutiny standard that petitioners contend is applicable or under the test set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

PARTIES TO THE PROCEEDINGS

The petitioners are Lorillard Tobacco Company; Brown & Williamson Tobacco Corporation; R.J. Reynolds Tobacco Company; Philip Morris Incorporated; and United States Tobacco Company. The respondent is Thomas F. Reilly, the Attorney General of Massachusetts. A separate petition for certiorari has been filed by Altadis U.S.A. Inc. (as successor to Consolidated Cigar Corporation and Havatampa, Inc.); General Cigar Co., Inc.; John Middleton, Inc.; L.J. Peretti Co., Inc.; Swedish Match North America, Inc.; Swisher International, Inc.; and Tobacco Exporters International (USA) Ltd., who were also parties to the consolidated appeals below.

RULE 29.6 STATEMENT

Petitioner Lorillard Tobacco Company has the following parent corporations:

Lorillard, Inc.
Loews Corporation

Lorillard Tobacco Company is a wholly owned subsidiary of Lorillard, Inc., which is a wholly owned subsidiary of Loews Corporation, which has outstanding securities in the hands of the public.

Petitioner R.J. Reynolds Tobacco Company has the following parent corporation:

R.J. Reynolds Tobacco Holdings, Inc. (formerly known as RJR Nabisco, Inc.)

R.J. Reynolds Tobacco Holdings, Inc. is the only publicly held company that owns 10% or more of R.J. Reynolds Tobacco Company's stock.

Petitioner Brown & Williamson Tobacco Corporation has the following parent corporations:

B•A•T Industries, p.l.c.
BATIC Inc.
BATUS Holdings Inc. UK/US
BATUS Tobacco Services, Inc.
British American Tobacco p.l.c.
British American Tobacco (1998) Limited
British-American Tobacco (Holdings) Ltd.
Louisville Securities Ltd.

British American Tobacco p.l.c. is the only publicly held company that owns 10% or more of Brown & Williamson Tobacco Corporation's stock.

Petitioner Philip Morris Incorporated has the following parent corporation:

Philip Morris Companies Inc.

Philip Morris Companies Inc. is the only publicly held company that owns 10% or more of Philip Morris Incorporated's stock.

Petitioner United States Tobacco Company has the following parent corporation:

UST Inc.

UST Inc. is the only publicly held company that owns 10% or more of United States Tobacco Company's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit in the consolidated appeals below.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-45a) is reported at 218 F.3d 30. The district court's memorandum and order disposing of petitioners' preemption claims on summary judgment (App., *infra*, 46a-60a) is reported at 76 F. Supp. 2d 124. The district court's memorandum and order resolving petitioners' First Amendment claims on summary judgment, and disposing of the remainder of the case (App., *infra*, 61a-104a), is reported at 84 F. Supp. 2d 180.

JURISDICTION

The court of appeals entered its judgment on July 17, 2000. App., *infra*, 1a-45a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The challenged regulations of the Massachusetts Attorney General, which are codified at 940 C.M.R. 21.00 and 22.00, are set out at App., *infra*, 105a-126a. The statute under which these regulations were promulgated, Mass. Gen. Laws ch. 93A, § 2, is set out at App., *infra*, 127a.

Section 5 of the Federal Cigarette Labeling and Advertising Act, as amended, 15 U.S.C. § 1334, provides:

> (a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
>
> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

The Supremacy Clause of the United States Constitution, art. VI, cl. 2, provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law * * * abridging the freedom of speech."

STATEMENT

In recent years, numerous states and local jurisdictions throughout the nation have enacted diverse and increasingly severe limitations on the public display of tobacco advertisements. *See* App., *infra*, 128a-134a. Like the Massachusetts regulations at issue in this case, many of these restrictions prohibit virtually *all* outdoor advertising (including indoor advertising that is visible from the street) within a broadly defined distance of any "park," "playground," or "school." As in this case, the resulting geographical sweep of these prohibitions often covers as much as 90% of the populated area in the jurisdiction. And again like the regulations in this case, many of these regulations impose further substantial restrictions on the display of tobacco advertising *inside* retail establishments. The purpose of all these restrictions is unabashedly censorial: as the Attorney General of Massachusetts candidly conceded below, the regulations are based on the premise that, for the putative purpose of preventing children from being exposed to "positive" images of tobacco products that involve health risks, any tobacco advertising aimed at adults must be banned from virtually all public areas.

Over the last several years, a wide range of retailers, manufacturers, and advertisers have filed suits challenging the validity, under federal law, of these state and local restrictions. As a result of this litigation, a clear conflict has emerged among the

federal circuits as to whether these sorts of regulations are preempted by the Federal Cigarette Labeling and Advertising Act. Addressing a set of regulations virtually identical to those at issue in this case, the Ninth Circuit held that they were expressly preempted by the Act. By contrast, the Second, Fourth, and Seventh Circuits have all upheld comparable restrictions on tobacco advertising. In this case, the First Circuit expressly adopted the reasoning of the Second and Seventh Circuits, and explicitly rejected the Ninth Circuit's decision. App., *infra*, 9a-13a & n.7. The resulting disarray among the lower federal courts cries out for this Court's prompt review.

The First Circuit's ruling in this case also raises an important and recurring question concerning the reach of this Court's decision in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). In the last decade alone, six Justices, including five members of the current Court, have questioned whether the scope of *Central Hudson*'s application, if not the test itself, should be reassessed. Just over a year ago, the Court once again reserved the question whether there are some types of governmental restrictions on commercial speech that should be evaluated under a more stringent test than *Central Hudson*. Because this question was cleanly presented below, and because the decisions below amply illustrate the inadequacy of *Central Hudson* in the context of a broadly based ban on a specific category of truthful and nonmisleading commercial speech, this case presents an ideal vehicle for resolving this important and recurring First Amendment issue.

1. In May 1998, the Attorney General of Massachusetts proposed the sweeping regulations on tobacco advertising that are challenged in this case. C.A. Joint Consolidated Appendix (JCA) 628. In November 1998, while the proposed regulations were still pending for public notice and comment, the Attorney Generals of 46 States (including Massachusetts) settled certain lawsuits against the four major cigarette manufacturers[1] by

[1] The four manufacturers are petitioners Lorillard Tobacco Company,

entering into a "Master Settlement Agreement" (MSA). *See* JCA 3322. In addition to agreeing to pay the States more than $200 billion over 25 years, the four manufacturers who signed the MSA voluntarily agreed to substantial restrictions on their outdoor advertising, including a prohibition on the use of billboards, a ban on the use of signs in arenas, stadiums, shopping malls, or video arcades, and a ban on any advertising outside retail stores that is larger than 14 square feet. JCA 3218, 3322, 3341, 3353-55. The MSA expressly excluded from these voluntary restrictions, *inter alia*, any advertising outside retail stores that is *less* than 14 square feet. *Id.*[2]

Despite having obtained the cigarette manufacturers' agreement to the MSA's substantial limitations on advertising, the Massachusetts Attorney General went forward with the previously proposed tobacco regulations, which were formally promulgated on January 22, 1999. Although the MSA and its accompanying consent decree also contain an explicit prohibition on any advertising that directly or indirectly targets minors, JCA 516, 3349-50, the Attorney General asserted that the proposed regulations' further severe restrictions on advertising were necessary to protect minors from the health risks of tobacco products. JCA 387-89. These regulations prohibit virtually all outdoor advertising of tobacco and sharply limit indoor advertising as well. As described by the Attorney General, the theory of the regulations is that, in order to prevent minors from being influenced by tobacco advertisements targeted at adults, *all* tobacco advertising must effectively be eliminated from public areas where it might be seen by children. JCA 540-41, 3214.[3]

Brown & Williamson Tobacco Corporation, R.J. Reynolds Tobacco Company, and Philip Morris Incorporated.

[2] Petitioner United States Tobacco Company, which makes smokeless tobacco products, agreed to virtually identical restrictions on outdoor advertising in the Smokeless Tobacco Master Settlement Agreement (STMSA). Forty-five states executed the STMSA, but Massachusetts was not a signatory.

[3] In issuing the regulations, the Attorney General relied upon his authority

Three provisions of these regulations are challenged in this Court.[4] First, 940 C.M.R. 21.04(5)(a) effectively eliminates the use of outdoor advertising to provide truthful brand, availability, price, and other information to adult consumers of tobacco products in Massachusetts. Specifically, § 21.04(5)(a) expressly prohibits manufacturers, distributors, and retailers of tobacco products from using any "[o]utdoor advertising" of cigarettes and smokeless tobacco products in "any location that is within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school." App., *infra*, 111a. Another provision of the regulations uses virtually identical language to impose these same restrictions on cigar advertising. 940 C.M.R. 22.06(5), App., *infra*, 123a.

The number of locations that trigger the 1,000 foot zone is so extensive that the resulting area covered by these regulations includes virtually the entire populated area of Massachusetts. Indeed, a detailed geographical analysis of the State's three largest cities revealed that between 87 and 91% of the land area of those cities was covered by § 21.04(5)(a)'s flat prohibition on outdoor advertising. JCA 3306-16. The severity of this

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to declare certain practices to be *per se* an "unfair and deceptive act or practice" under Mass. Gen. Laws ch. 93A, § 2. App., *infra*, 127a. It is undisputed, however, that the regulations do *not* require any showing of falsity; indeed, at least for purposes of summary judgment, the Attorney General was willing to assume "that the tobacco advertisements at issue here are truthful, nonmisleading speech about a lawful activity." *Id.* at 17a.

[4] In the proceedings below, several petitioners also challenged certain provisions of 940 C.M.R. 21.04(1) that prohibited various promotional practices in a manner that went above and beyond the restrictions included within the MSA. The scope of several of these provisions, however, was modified by certain regulatory amendments that were proposed while this action was pending in the district court. Although a copy of these amendments was submitted to the district court, the validity of the modified version of § 21.04(1) was not squarely presented to the lower courts and was, in any event, never specifically mentioned by the court of appeals. Petitioners reserve the right to challenge these amended provisions at a future date, but their validity is not before this Court at this time.

prohibition on "outdoor advertising" is further magnified by the fact that that term is defined to include not only advertising that is actually "outside," but also any advertising that is "within a retail establishment that is directed toward or visible from the outside of the establishment." 940 C.M.R. 21.04(5)(a), App., *infra*, 111a. The term "advertising," in turn, is sweepingly defined to include "any oral, written, graphic or pictorial statement or representation * * * the purpose or effect of which is to promote the use or sale" of cigarettes or smokeless tobacco products. *Id.*, § 21.03, App., *infra*, 107a.[5]

Second, 940 C.M.R. 21.04(5)(b) provides that, *inside* any retail establishment that is accessible to minors and that is within the same 1,000-foot zone, no portion of any advertisement of cigarettes or smokeless tobacco may be "placed lower than five feet from the floor." App., *infra*, 111a. Again, another section of the regulations uses virtually identical language in imposing the same restrictions on cigar advertising in Massachusetts. 940 C.M.R. 22.06(5)(b), App., *infra*, 123a.

Third, 940 C.M.R. 21.04(2)(c) and (d) severely restrict the visible display of tobacco products in retail outlets by requiring that cigarettes and smokeless tobacco be placed "out of the reach of all consumers, and in a location accessible only to outlet personnel." App., *infra*, 109a. Subsections 22.06(2)(c) and (d) of the same regulations impose identical restrictions on the display of cigar products. App., *infra*, 121a.

2. In May 1999, petitioners filed separate federal actions

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[5] The prohibition set forth in § 21.04(5)(a) was subject to one exception: a retailer could place a single sign, no more than four feet square and containing only black text on a white background, stating "Tobacco Products Sold Here." 940 C.M.R. 21.04(6), App., *infra*, 111a. Ironically, this was the only provision of the regulations that the district court invalidated on preemption grounds, and the Attorney General did not cross-appeal this aspect of the decision. App., *infra*, 6a & n.2. Thus, in its current form, § 21.04(5)(a) imposes a flat ban – throughout virtually all of Massachusetts – on any outdoor advertising of cigarettes or smokeless tobacco and on any indoor advertising that is visible from the street.

for declaratory and injunctive relief challenging various aspects of the regulations. A similar lawsuit was also filed by eight cigar companies, and all of the actions were ultimately consolidated. The district court had jurisdiction over these actions pursuant to 28 U.S.C. §§ 1331 and 1343. The cigarette companies alleged, *inter alia*, that several of the regulations were preempted by § 5(b) of the Federal Cigarette Labeling and Advertising Act (FCLAA), 15 U.S.C. § 1334(b), which provides that States shall not impose any "requirement or prohibition based on smoking and health * * * with respect to the advertising or promotion" of cigarettes.[6] Petitioners also alleged that certain provisions of the regulations violated the First Amendment.

On December 2, 1999, the district court granted partial summary judgment to the Attorney General, holding that § 5(b) of the FCLAA did not preempt either the outdoor advertising prohibition (§ 21.04(5)(a)) or the ban on indoor advertisements that were less than five feet from the floor (§ 21.04(5)(b)). App., *infra*, 59a-60a. The court relied on the "purpose" and legislative history of the statute to conclude that, notwithstanding the breadth of the statute's plain language, "*location*-based restrictions [on advertising] are not preempted by the Act." App., *infra*, 56a (emphasis added). Because § 21.04(5) outlawed tobacco advertising only if it was placed "outdoor[s]" or at "ground-level," the court held that it was a location restriction that was not preempted. *Id.*

Shortly thereafter, the district court issued a second order granting summary judgment to the Attorney General on all but one of the First Amendment claims. The court rejected petitioners' threshold contention that, because the regulations effectively suppressed all tobacco advertising in public areas, a

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[6] Petitioner United States Tobacco Company also raised a preemption claim, contending that because cigarettes and smokeless tobacco were addressed together in a single set of provisions, the regulations' coverage of smokeless tobacco could not be severed from the preempted cigarette regulations. App., *infra*, 6a n.3.

heightened standard of scrutiny should apply. App., *infra*, 67a. Because cigarette advertising was, in the district court's view, "functional pornography" that promoted a product with "no readily discernable social or health benefits," there was "no compelling reason to apply a heightened standard." *Id.* at 61a, 68a. Applying the four-part test set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), the court upheld the outdoor advertising restrictions in § 21.04(5)(a), but concluded that the Attorney General had wholly failed to support the indoor advertising limitations in § 21.04(5)(b). App., *infra*, 82a-83a.

3. The court of appeals affirmed in part and reversed in part, thereby upholding in their entireties the advertising and display regulations relevant here. App., *infra*, 45a. With respect to the preemption claims, the First Circuit noted that there was a split of authority among the federal courts of appeals as to whether the FCLAA preempts advertising restrictions virtually identical to those contained in § 21.04(5). Declining to adopt what it termed a "hyper-literal" reading of the statutory phrase "with respect to the advertising or promotion of cigarettes," the court of appeals instead endorsed the Second Circuit's view that the sorts of restrictions on tobacco advertising at issue here do "'not impose obligations "with respect to" advertising as that phrase is used in § 1334(b).'" App., *infra*, 10a (quoting *Greater N.Y. Metro. Food Council, Inc. v. Giuliani*, 195 F.3d 100, 109 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 1671 (2000)). Relying instead upon its view of Congress' underlying "purposes" in enacting the FCLAA, the court of appeals agreed with the Second and Seventh Circuits that, in light of the States' traditional power to prescribe local zoning restrictions on the placement of advertisements, Massachusetts' regulations were "location restrictions" that did not "present the kind of 'diverse, nonuniform, and confusing' advertising standards with which Congress was concerned when it enacted the FCLAA." App., *infra*, 13a & n.7 (quoting 15 U.S.C. § 1331) (citing *Giuliani*, 195 F.3d at 106-07, and *Federation of Adver. Indus. Representatives, Inc. v. Chicago*, 189 F.3d 633 (7th Cir. 1999),

cert. denied, 120 S. Ct. 1671 (2000) (*FAIR*)). For these reasons, the First Circuit expressly rejected the Ninth Circuit's view that "'[t]here is no good reason to believe that Congress meant less than what it said' in the phrase 'with respect to advertising.'" *Lindsey v. Tacoma-Pierce County Health Dep't*, 195 F.3d 1065, 1073 (9th Cir. 1999), *amended*, 203 F.3d 1150 (9th Cir. 2000) (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 522 (1992)). *See* App., *infra*, 13a n.7.

The court of appeals also rejected petitioners' contention that the advertising and display restrictions violated the First Amendment. App., *infra*, 14a. In determining what level of scrutiny to apply, the court expressly agreed with petitioners that the regulations were "plainly content-based." As the court observed, "[a]dvertising of other products [than tobacco] is not restricted by the regulations, nor is tobacco-related speech that has a purpose or effect other than promotion, such as public health campaigns." *Id.* Despite acknowledging "recent rumblings from members of the Supreme Court and others suggesting that the *Central Hudson* test may be in need of minor or major modification" in such cases, the court of appeals nonetheless concluded that it was "bound to apply the *Central Hudson* test, as is, to this case." App., *infra*, 16a.

Applying *Central Hudson*, the court of appeals noted that, for purposes of summary judgment, the Attorney General had conceded *arguendo* that "the tobacco advertisements at issue here are truthful, nonmisleading speech about a lawful activity." App., *infra*, 17a. The court also concluded that the State's interest in reducing tobacco consumption by minors was "substantial." *Id.* In evaluating whether the Attorney General had demonstrated that the proposed regulations would "directly advance" that interest, the court held that it was sufficient for respondent to rely upon the "'common-sense' argument that advertising has some cause-effect relationship with consumption" and to submit (without any supporting expert testimony) a collection of studies and articles culled from governmental reports and various publications. *Id.* at 26a.

As to the fourth and final prong of the *Central Hudson* test, the court of appeals concluded that the regulations were sufficiently "'narrowly tailored to achieve the desired objective.'" App., *infra*, 29a (citation omitted). The court held that the 1,000-foot benchmark was not arbitrary because it had been copied from the FDA's proposed outdoor advertising regulations – even though respondent conceded in the district court that the distance "was based on the [FDA's] analysis of the visibility of large billboards." App., *infra*, 80a-81a. The First Circuit acknowledged that the record showed that the effect of using a 1,000-foot rule in Massachusetts would be to make all outdoor tobacco advertising illegal in up to 90% of the land area of the State's major cities, but it concluded that, despite the "sheer size" of the locations covered, the regulations were adequately tailored because these were all "areas where children are more likely to be." *Id.* at 30a.

The court of appeals also rejected petitioners' contention that the *indoor* advertising restrictions had not been shown to be narrowly tailored. The district court had invalidated these restrictions, largely because respondent presented no evidence to support them other than to point to the FDA regulations, which did *not* regulate indoor advertising. App., *infra*, 31a. The First Circuit expressed "misgivings" about the plausibility of respondent's assumption that minors under five feet tall will not look above eye-level, but it nonetheless reversed the district court on this issue, holding that "such determination falls within that range of reasonableness in which the Attorney General is best suited to pass judgment." *Id.*

REASONS FOR GRANTING THE PETITION

The First Circuit's holding that Massachusetts' restrictions on tobacco advertising are not restrictions "with respect to advertising" is inconsistent with the text of the FCLAA, this Court's decision in *Cipollone*, and the Ninth Circuit's directly contrary decision in *Lindsey*. Moreover, the decision below, and others like it in other circuits, have encouraged literally dozens of jurisdictions to enact their own idiosyncratic tobacco

advertising regulations, thereby creating precisely the "patchwork" of diverse, nonuniform, and confusing cigarette advertising regulations that Congress sought to avoid in enacting the FCLAA. Review should be granted to resolve the conflict among the circuits with respect to this important question.

This Court should also grant review to address an important and recurring question concerning the applicability of *Central Hudson*. As several members of this Court have noted, the balancing test set forth in that case provides insufficient protection against a broadly based ban on a specific category of truthful, nonmisleading commercial speech. The Court, however, has yet to agree upon a standard for identifying what sort of commercial speech prohibitions might be subject to a more searching scrutiny than the *Central Hudson* test. This case provides a singularly appropriate vehicle for resolving that question. The issue of *Central Hudson*'s applicability was specifically raised and decided in the lower courts, and the unparalleled breadth and severity of the commercial speech restrictions in this case provide an ideal context for considering whether there are, in fact, any contexts in which the *Central Hudson* test ought not be applied. As set forth below, this Court's cases support the view that, when a particular restriction on truthful and nonmisleading commercial speech creates a substantial risk that the government is seeking to handicap the expression of particular ideas, the regulation must receive strict scrutiny, and the *Central Hudson* test is inapplicable. Those criteria are amply satisfied in this case, where the State has enacted a set of viewpoint-discriminatory regulations that effectively eliminate from public view an entire category of commercial speech concerning a highly disfavored product.

I. THE COURT SHOULD GRANT REVIEW TO RESOLVE A SPLIT OF AUTHORITY ON AN IMPORTANT QUESTION CONCERNING THE PROPER CONSTRUCTION OF THE FCLAA

A. The First Circuit's Construction Of The "With Respect To Advertising" Clause Of The FCLAA Is Inconsistent With *Cipollone* And Exacerbates A Circuit Split On This Important Question

This Court should grant review in order to resolve a well-developed conflict among the courts of appeals concerning the important question whether the FCLAA's preemption of requirements or prohibitions "with respect to the advertising" of cigarettes should be read to apply only to regulations with respect to the *content* of tobacco advertising. The decision below highlights a mature circuit split in which the First, Second, and Seventh Circuits are on one side and the Ninth Circuit is on the other side. Review should also be granted because the First Circuit's ruling is contrary to the statutory text, is inconsistent with this Court's decision in *Cipollone*, and has further undermined Congress' purpose in enacting the FCLAA, which was to avoid precisely the sort of diverse local regulations of tobacco advertising that have been upheld in this and other cases. Indeed, as of today, literally dozens of jurisdictions have enacted various tobacco-specific advertising regulations, and the decision below will only further accelerate this trend towards disuniformity. *See* App., *infra*, 128a-134a.

The Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 *et seq.*, establishes a comprehensive federal program concerning the advertising and promotion of cigarettes. In its current form, the Act requires that cigarette packages sold or distributed in the United States contain certain warnings concerning the health effects of cigarettes, *id.*, § 1333; bans radio and television advertising of cigarettes, *id.*, § 1335; confirms the authority of the Federal Trade Commission (FTC) to regulate "unfair or deceptive acts or practices in the advertising of cigarettes," *id.*, § 1336; and requires the FTC to

submit annual reports to Congress concerning cigarette advertising, *id.*, § 1337. As part of this federal program, section 5(b) of the Act contains an express preemption of state law:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

Id., § 1334(b).

In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), this Court considered the extent to which § 5(b) of the FCLAA preempted state common law actions. In addressing that question, the Court unanimously agreed that the scope of the FCLAA's preemption provision was controlled by its express language. *See id.* at 521-22 (plurality) ("'We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning.'") (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)); *id.* at 532 (Blackmun, J., joined by Kennedy and Souter, JJ., concurring in part and dissenting in part) ("An interpreting court must 'begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'") (quoting *FMC Corp. v. Holliday*, 498 U.S. 52, 57 (1990)); *id.* at 548 (Scalia, J., joined by Thomas, J., concurring in part and dissenting in part) (stating that the language of § 5(b) "should be given its ordinary meaning").

The First Circuit's construction of § 5(b) of the FCLAA in this case cannot be reconciled with *Cipollone*, with the statutory text, or with ordinary rules of common English usage. In upholding the challenged regulations, the First Circuit held that a restriction on the *location* of cigarette advertising is not a requirement "with respect to * * * advertising" of cigarettes within the meaning of § 5(b). The resulting anomalous construction – that a direct regulation of advertising is not a

regulation "with respect to" advertising – is utterly "at odds with the plain words" of the FCLAA, 505 U.S. at 521 (plurality), and disregards the "ordinary meaning" of the statutory language. *Id.* at 532 (Blackmun, J., joined by Kennedy and Souter, JJ.). To be sure, there is room for debate concerning the circumstances in which a regulation of matters *other* than advertising must nonetheless be deemed to be a "requirement or prohibition with respect to advertising." *Compare id.* at 524, 528 (plurality) *with id.* at 555 (Scalia, J., joined by Thomas, J.); *cf. New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654-56 (1995). But to suggest that Massachusetts' severe regulation of cigarette advertising does *not* impose requirements "with respect to * * * advertising" does violence to the words chosen by Congress.[7]

In adopting this countertextual construction of the statute, the First Circuit largely followed the reasoning of the Second and Seventh Circuits on the same question. App., *infra*, 9a-13a. Like the First Circuit, those courts had concluded that the FCLAA's preemption provision did not apply to restrictions on the *location* of advertising. *See Greater N.Y. Metro. Food Council*, 195 F.3d at 109 (upholding a virtually identical New York City ordinance); *FAIR*, 189 F.3d at 639-40 (upholding a similar ordinance that prohibited most tobacco advertising in Chicago). But as the Ninth Circuit explained in rejecting this same exact reading of the statute, "[t]he distinction between location and content regulations is unsupportable by reference to the text" of § 5(b). *Lindsey*, 195 F.3d at 1072 (invalidating,

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[7] The First Circuit's reliance upon *Travelers* starkly illustrates its error. At issue in that case was a New York statute that did *not* specifically govern ERISA plans, and the question was whether the statute nonetheless was pre-empted because the statute "'relate[d] to'" an ERISA plan. 514 U.S. at 649-51 (quoting 29 U.S.C. § 1144(a)). The apt analogy is not to a statute that, as in *Travelers*, extends beyond benefit plans, but rather to a statute that, by its terms, *directly* regulates ERISA plans. *Travelers* confirms that such a statute would "relate to" an ERISA plan and would be preempted. *Id.* at 656, 668. Similarly, Massachusetts' direct regulation of cigarette advertising unquestionably is a prohibition "with respect to" cigarette advertising.

on preemption grounds, a substantially similar ordinance prohibiting all outdoor tobacco advertising in the Tacoma, Washington area). Indeed, contrary to *Cipollone*, the First Circuit's decision effectively rewrites the FCLAA so as to apply only to a "requirement or prohibition with respect to the [*content of*] advertising or promotion of any cigarettes." This sort of judicial amendment of the statute is flatly inconsistent with settled principles of statutory construction. *See, e.g.*, *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 169 (1993) ("[W]e may not add terms or provisions where Congress has omitted them.").

Additionally, as the Ninth Circuit observed in *Lindsey*, there is another respect in which the content/location distinction is inconsistent with *Cipollone* and the statutory text. The plurality in *Cipollone* noted that, as originally enacted in 1965, § 5(b) of the FCLAA applied only to regulation of the *content* of advertising: "'[n]o *statement* relating to smoking and health shall be required *in the advertising* of any cigarettes * * * .'" 505 U.S. at 514 (quoting Pub. L. 89-92, 79 Stat. 282, § 5(b)) (emphasis added). In 1969, however, the preemption provision was completely rewritten, so that it now reaches beyond regulation of the content of advertising to any regulation "with respect to" advertising:

> Compared to its predecessor in the 1965 Act, the plain language of the pre-emption provision in the 1969 Act is much broader. First, the later Act bars not simply 'statement[s]' but rather 'requirement[s] or prohibition[s] * * * imposed under State law.' *Second, the later Act reaches beyond statements 'in the advertising' to obligations 'with respect to the advertising or promotion' of cigarettes.*

505 U.S. at 520 (plurality) (emphasis added). The Ninth Circuit correctly noted that incorporating a "content" limitation into the current version of § 5(b) fails to give effect to Congress' deliberate change in the language of the provision: "[T]he distinction between content regulations and location regulations

cannot now be sustained because the 1965 statute only preempted content regulations and the 1969 amendments broadened the scope of preemption beyond state laws that regulated only the content of tobacco advertisements." 195 F.3d at 1074. Moreover, reading a content/location distinction into § 5(b) would disregard the clear difference in language between that provision and § 5(a) of the FCLAA, which narrowly and specifically preempts state-mandated warning labels on cigarettes. *Id.* ("In order to distinguish the language currently used in § 1334(a) from the language currently used in § 1334(b), § 1334(b) must be read as preempting more than just content regulations.").[8]

The court of appeals did not dispute that its content/location distinction has no basis in the text of § 5(b). Rather, again following the Second and Seventh Circuits, the court stated that Massachusetts' "location" restrictions were not preempted by § 5(b) because they "do not interfere with the cigarette and smokeless tobacco labeling and advertising scheme established by Congress." App., *infra*, 12a; *see also Greater N.Y. Metro. Food Council*, 195 F.3d at 109 (same); *FAIR*, 189 F.3d at 639 (same). As the Ninth Circuit held in *Lindsey*, this argument patently misconstrues Congress' purpose both in enacting the FCLAA and in expanding its preemption provision in 1969:

> If every board of health, city, county, and state in this country regulated the location of tobacco advertisements * * * like the Board has in this case, the purpose of the FCLAA would be frustrated because the national economy would be impeded by diverse, nonuniform, and confusing

[8] In *Penn Advertising of Baltimore, Inc. v. Mayor & City Council*, 63 F.3d 1318, 1324 (4th Cir. 1995), *vacated on other grounds*, 518 U.S. 1030 (1996), the Fourth Circuit adopted the same content/location distinction, but purported to ground it in the "based on smoking and health" clause of § 5(b). But as the Second Circuit noted in *Greater N.Y. Metro. Food Council*, the argument that these facially *tobacco-specific* regulations are not "based on smoking and health" is "sophistry." 195 F.3d at 108. The First Circuit in this case likewise explicitly declined to adopt this view. App., *infra*, 13a n.6.

cigarette advertising regulations.

195 F.3d at 1074-75. Moreover, as Justice Blackmun (joined by Justices Kennedy and Souter) observed in his separate opinion in *Cipollone*, the 1969 amendment was intended, at a minimum, "to ensure that a State could not do through negative mandate (*e.g., banning all cigarette advertising*) that which it already was forbidden to do through positive mandate (*e.g.*, mandating particular cautionary statements)." 505 U.S. at 539 (emphasis added). Massachusetts' effort to ban outdoor cigarette advertising in virtually all populated areas of the State directly frustrates Congress' intent to prevent States from "banning all cigarette advertising." *Id.*

The legislative history confirms Congress' intent that States be prohibited from any effort to impose distinctive requirements on *tobacco* advertising. In the face of renewed state efforts to regulate or ban cigarette advertising, *see Cipollone*, 505 U.S. at 515 & n.11, Congress amended the Act in 1969 precisely to further protect against "the chaos created by a multiplicity of conflicting regulations." S. Rep. No. 91-566 (1969), at 12. The resulting legislative compromise included a strengthening of the required warning labels, a prohibition of cigarette advertising on radio or television, an affirmation of the FTC's jurisdiction over certain aspects of cigarette advertising – and a significant broadening of the preemptive scope of the Act. *See* Pub. L. 91-222, 82 Stat. 89 (1970).

The First Circuit also sought to justify its holding on the ground that, because zoning restrictions were "peculiarly within the states' historic police powers," § 5(b) should be narrowly construed, in accordance with the "presumption against preemption," so as not to restrict regulations concerning the location of advertising. App., *infra*, 11a (quoting *Greater N.Y. Metro. Food Council*, 195 F.3d at 109). This analysis fails, however, because it ignores this Court's holding in *Cipollone* that the "presumption against pre-emption" cannot be invoked *in disregard of the statutory text*. *Cipollone*, 505 U.S. at 523 (plurality) (notwithstanding any "presumption against pre-

emption," the phrase "state law" in § 5(b) could not "fairly" be construed to exclude state common law); *id.* at 548-49 (Scalia, J., joined by Thomas, J.) (agreeing that § 5(b) covered common law claims, but rejecting any presumption against preemption). *See also Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 417 (1998) (where the language is clear, there is "no reason * * * even to resort to the canons of construction that we use to resolve doubtful cases"). Moreover, the First Circuit's faulty analogy to zoning restrictions also ignores Congress' intent specifically to prohibit a patchwork of *tobacco-specific* advertising regulations.

The Ninth Circuit's decision in *Lindsey* refutes, point-by-point, the Second and Seventh Circuits' construction of the "with respect to * * * advertising" clause of § 5(b). By expressly rejecting the Ninth Circuit's approach and instead aligning itself with the Second and Seventh Circuits, App., *infra*, 13a n.7, the First Circuit has deepened and exacerbated the circuit conflict that exists on this important issue. This split of authority among the lower courts is ripe for resolution by this Court.

B. The Division Of Authority Among The Lower Courts Has Encouraged The Enactment Of Dozens Of Different Local Restrictions On Tobacco Advertising, Contrary To Congress' Intent In Enacting The FCLAA

The decision below, like the comparable decisions of the Second and Seventh Circuits, directly frustrates the FCLAA's purpose of "protecting the national economy from the burden imposed by diverse, nonuniform, and confusing cigarette labeling and advertising regulations." *Cipollone*, 505 U.S. at 514. Indeed, there are now literally dozens of different local ordinances that impose special restrictions only on tobacco advertising, thereby seriously impeding Congress' purpose in enacting the FCLAA. *See* App., *infra*, 128a-134a. The continued proliferation of these restrictions — some of which have been upheld and others of which have been held

preempted — demonstrates that the issue is important and recurring. It also demonstrates that the question is of substantial concern, not only to the parties to this action, but also to literally thousands of retailers throughout the country, as well as to dozens of state and local governments. This Court should grant certiorari to resolve this important question.

II. THE COURT SHOULD GRANT REVIEW TO CLARIFY THE STANDARDS APPLICABLE TO A BROADLY BASED PROHIBITION ON A SPECIFIC CONTENT-BASED CATEGORY OF TRUTHFUL AND NONMISLEADING COMMERCIAL SPEECH

A. This Case Raises An Important And Recurring Question Concerning The Proper Scope Of This Court's Decision In *Central Hudson*

In *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), this Court adopted an intermediate-scrutiny test for addressing First Amendment challenges to restrictions on commercial speech. Under that test, the Court must consider whether the restriction "directly advances" a "substantial" state interest and "is no more extensive than necessary" to further that interest. *Id.* at 564, 566-67. However, there is considerable uncertainty about whether *Central Hudson* applies across-the-board to all restrictions on commercial speech or whether the applicability of that test is or should be more limited.

The Court's most recent commercial speech cases highlight the extent of the uncertainty regarding the scope of *Central Hudson*. In *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 184 (1999), eight Justices noted that "certain judges, scholars, and *amici curiae* have advocated repudiation of the *Central Hudson* standard and implementation of a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech." The Court concluded that the gambling advertising restrictions at issue in that case were unconstitutional even under the

intermediate-scrutiny test adopted in *Central Hudson*, and it expressly reserved the question of what circumstances might justify a stricter standard in the commercial speech area. *See id.*

This uncertainty was even more apparent in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), in which the Court unanimously invalidated the liquor advertising restrictions at issue, but was deeply divided over the proper scope of *Central Hudson*. Five Justices in *44 Liquormart* concluded that *Central Hudson* does *not* state the appropriate test for all commercial-speech restrictions. Justices Stevens, Kennedy, and Ginsburg expressly rejected the proposition that "all commercial speech regulations are subject to a similar form of constitutional review" and instead concluded that intermediate scrutiny is appropriate only where a state acts to protect consumer choice in the underlying marketplace, rather than to suppress truthful and nonmisleading information:

> When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for affording constitutional protection to commercial speech and therefore justifies less than strict review. However, when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.

Id. at 501 (plurality). Justice Thomas similarly concluded that intermediate scrutiny was inappropriate "at least when, as here, the asserted interest is one that is to be achieved through keeping would-be recipients of the speech in the dark," and he asserted even more broadly that there is no "philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial speech.'" *Id.* at 522-23 (Thomas, J., concurring in the judgment). Justice Scalia

likewise "share[d] Justice Thomas's discomfort with the *Central Hudson* test," which he found "to have nothing more than policy intuition to support it," and he argued that commercial speech should be judged by reference to "the long accepted practices of the American people." *Id.* at 517 (Scalia, J., concurring in the judgment).

In other recent cases as well, several Justices have raised similar questions about the proper scope of the intermediate-scrutiny test of *Central Hudson*. *See, e.g., Rubin v. Coors Brewing Co.*, 514 U.S. 476, 492 (1995) (Stevens, J., concurring in the judgment) (*Central Hudson* applies only where government seeks to "prohibit misleading speech that would be protected in other contexts" or to "requir[e] affirmative disclosures that the speaker might not make voluntarily"); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 433-34 & n.1 (1993) (Blackmun, J., concurring in the judgment) (intermediate scrutiny is appropriate only where commercial speech involves "false statements of fact" or "advocat[es] illegal activities"). Thus, over the last decade alone, six Justices – including a majority of the current Court – have indicated that *Central Hudson* does not or should not establish a test of intermediate scrutiny that is generally applicable to *all* commercial speech restrictions.

This concern about the proper scope of *Central Hudson* tracks the Court's more general First Amendment principles. Under those principles, content-based restrictions on speech are highly suspect. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid."); *Carey v. Brown*, 447 U.S. 455, 462-63 (1980) ("Any restriction on expressive activity because of its content would completely undercut the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.") (internal quotation marks omitted); *Police Dept. v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its

subject matter, or its content."). Moreover, viewpoint-based restrictions are even more suspect. *See, e.g., Rosenberger v. Rector & Visitors of Univ.*, 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

To be sure, many commercial speech restrictions are content-based. But the Court has never held that the constitutional presumptions against content-based and viewpoint-based speech restrictions are entirely inapplicable in the commercial speech context. On the contrary, the Court repeatedly has invalidated commercial-speech restrictions that it concluded were impermissibly content-based. *See, e.g., Discovery Network*, 507 U.S. at 428-30; *Linmark Assocs., Inc. v. Willingboro Township*, 431 U.S. 85, 96 (1977); *see also 44 Liquormart*, 517 U.S. at 501 (plurality) ("Our commercial speech cases have recognized the dangers that attend governmental attempts to single out certain messages for suppression.").

Moreover, in *R.A.V.*, this Court established general principles for assessing the constitutionality of content-based restrictions on entirely *unprotected* categories of speech. The Court held that if such restrictions rest on a justification unrelated to the "distinctively proscribable content" of the entire category of speech at issue, "they are presumptively invalid" and must receive strict scrutiny. *See* 505 U.S. at 382-84. As examples of permissible and impermissible content-based distinctions under this rule, the Court explained that "a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection) is in its view greater there. But a State may not prohibit only that commercial advertising

that depicts men in a demeaning fashion." *Id.* at 388-89 (citations omitted). Applying similar logic, four Justices in *44 Liquormart* found it "perfectly clear" that a State "could not ban all obscene liquor ads except those that advocated temperance." 517 U.S. at 513 (plurality). These principles rest on the fundamental premise that, whatever the category of speech at issue, content-based regulation is suspect whenever there is a "realistic possibility that official suppression of ideas is afoot." *R.A.V.*, 505 U.S. at 390. If these principles apply to entirely unprotected categories of speech (as *R.A.V.* held), then they also must apply to commercial speech (which plainly *is* protected as a category).

These principles apply fully to this case, which presents an ideal vehicle for clarifying the outer limits of *Central Hudson*. The question whether *Central Hudson* should apply here was specifically argued and decided in the lower courts. Indeed, the First Circuit expressly acknowledged "the recent rumblings from members of the Supreme Court and others suggesting that the *Central Hudson* test may be in need of minor or major modification," but it concluded that "it is not our role to anticipate changes in well-established constitutional doctrines." App., *infra*, 16a. Moreover, this case involves precisely the sort of broadly-based prohibition to which *Central Hudson* is or should be inapplicable. As the matter comes to this Court, there is no dispute that the advertising at issue involves only "truthful, nonmisleading speech about a lawful activity." *Id.* at 17a. There is also no serious dispute that the regulations, which target only *tobacco* advertising, are "plainly content-based." *Id.* at 14a. And there is also no dispute about the singular sweep and severity of Massachusetts' restrictions, which cover approximately 90 percent of the most populated areas of the State and which foreclose all practical alternative channels of advertising for many retailers. *Id.* at 31a-34a. In sum, if there is ever to be a case in which *Central Hudson* ought not be applied, this is that case.

In particular, this case satisfies any of the possible standards

that might warrant the application of strict scrutiny. Under the test advocated by Justices Stevens, Kennedy, and Ginsburg in *44 Liquormart*, strict scrutiny is appropriate because the Massachusetts advertising regulations do not "protect consumers from misleading, deceptive, or aggressive practices," and do not "requir[e] the disclosure of beneficial consumer information," but instead "prohibi[t] the dissemination of truthful, nonmisleading, commercial messages for reasons unrelated to the preservation of a fair bargaining process." *44 Liquormart*, 517 U.S. at 501 (plurality opinion); *cf. Carey v. Population Servs. Int'l*, 431 U.S. 678, 700 (1977) (statute that "completely suppress[es]" information about a product is unconstitutional).[9] Under the test advocated by Justice Thomas (and for which Justice Scalia expressed support), strict scrutiny is appropriate because Massachusetts seeks to achieve its interest "through keeping would-be recipients of speech in the dark." *44 Liquormart*, 517 U.S. at 522-23 (opinion concurring in the judgment). And, under the more general principles adopted by the Court in *R.A.V.*, strict scrutiny is appropriate because the content-based restrictions on *tobacco* advertising cannot be justified by tobacco-specific concerns about fraud or a fair bargaining process, *see* 505 U.S. at 388; on the contrary, respondent has conceded *arguendo* that the prohibited advertising involves the suppression of truthful and nonmisleading speech. App., *infra*, 17a.

Moreover, the tobacco regulations are *viewpoint*-based because they apply only to communications that "*promote* the use or sale" of tobacco, *see* 940 C.M.R. 21.03, App., *infra*, 107a (emphasis added), and, as the court of appeals acknowledged, they do *not* similarly apply to other "tobacco-related speech

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[9] The statute in *Carey* was invalidated to the extent that it prohibited the "advertisement or *display*" of contraceptives, *see* 431 U.S. at 700 (emphasis added). Accordingly, the same First Amendment principles apply to the display regulations at issue in this case, *see* 940 C.M.R. 21.04(2)(c), (d), App., *infra*, 109a; *id.*, § 22.06(2)(c), (d), App., *infra*, 121a; as to the advertising regulations, *see* 940 C.M.R. 21.04(5), App., *infra*, 111a ; *id.*, § 22.06(5), App., *infra*, 123a.

that has a purpose or effect other than promotion, such as public health campaigns." App., *infra*, 14a. Indeed, as the First Circuit acknowledged, the tobacco regulations seek to "dispe[l] the advertising-encouraged notion that tobacco products are pervasive and form part of the 'good life.'" *Id.* at 29a. In First Amendment terms, they are thus even worse than the viewpoint-*neutral* restriction on "information concerning any lottery" that was unanimously invalidated in *Greater New Orleans Broadcasting*, 527 U.S. at 177, or the viewpoint-*neutral* restriction on alcohol price advertising that was unanimously invalidated in *44 Liquormart*, 517 U.S. at 490.[10]

Finally, the inherent manipulability of the *Central Hudson* balancing test further counsels against its application to the sort of broadly based restrictions on truthful and nonmisleading commercial speech at issue here. Applying *Central Hudson*, the district court concluded that the level of First Amendment protection for commercial speech varies according to whether the product at issue is "socially- or politically-important," and whether it has any "readily discernable social or health benefits." App., *infra*, at 66a. For its part, the court of appeals stressed that *Central Hudson* permits a wide "range of reasonableness in which the Attorney General is best suited to pass judgment." *Id.* at 31a. Under these vague and forgiving standards, further attacks on the truthful and nonmisleading advertising of politically unpopular products can be expected to accelerate. This Court would be forced either to abandon its policing of such restrictions or instead to continue reviewing such restrictions (as it recently has done in *Coors*, *44*

[10] While simultaneously attempting to suppress speech that promotes the use or sale of tobacco, Massachusetts itself is actively engaged in speech to discourage that use or sale; indeed, then-Attorney General Harshbarger announced his decision to promulgate these regulations as part of the State's continuing "war against Big Tobacco." JCA 323. Although such comments are undoubtedly politically popular, they serve only to reinforce the need for strict scrutiny: "Reviewing speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said." *Denver Area Educ. Tel. Consortium, Inc. v. FCC*, 518 U.S. 727, 774 (1996) (Souter, J., concurring).

Liquormart, and *Greater New Orleans Broadcasting*), based on case-specific applications of *Central Hudson*. The unattractiveness of these options confirms that a more rigorous test is appropriate in these circumstances.

The court of appeals applied intermediate scrutiny to a content-based and viewpoint-based regulation that largely suppresses public display of truthful and nonmisleading speech about a single, politically unpopular product. This Court should grant review to determine whether the *Central Hudson* test can be so far extended.

B. The Court Should Grant Certiorari To Determine Whether *Central Hudson* Permits A Virtual Ban On Outdoor Tobacco Advertising In Order To Insulate Minors From Tobacco

Even assuming that intermediate scrutiny were appropriate, this Court should grant review to determine whether *Central Hudson* permits a virtual ban on the advertising of any product, such as tobacco, that is lawful for adults but not for children. The First Circuit construed *Central Hudson* to permit such a virtual ban. Its decision not only conflicts with this Court's precedents but will, if left undisturbed, establish a sweeping new "vice" exception to those precedents.

Central Hudson makes clear that restrictions on commercial speech must be "'not more extensive than is necessary'" to directly advance substantial government interests. *Greater New Orleans Broadcasters*, 527 U.S. at 183 (quoting *Central Hudson*, 447 U.S. at 566). Accordingly, this Court has required restrictions on commercial speech to leave open adequate alternative channels for advertising the product or service at issue: it has upheld restrictions that left open "many alternative channels for communicating necessary information" about the product or service, *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 633-34 (1995), and it repeatedly has invalidated restrictions where no such "alternative channels" were readily available. *See, e.g.*, *44 Liquormart*, 517 U.S. at 501-02

(plurality); *id.* at 529-30 (O'Connor, J., concurring in the judgment); *Linmark Assocs.*, 431 U.S. at 92-94.

Applying these principles, this Court has held that, despite the importance of insulating minors from certain products, commercial speech restrictions cannot "'reduce the adult population * * * to reading only what is fit for children.'" *Bolger v. Young Drug Prods. Corp.*, 463 U.S. 60, 73 (1983) (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)). In *Bolger*, this Court invalidated a federal statute prohibiting unsolicited mailed advertisements for contraceptives. Despite acknowledging the importance of the government interest in protecting children from these advertisements, the Court concluded that "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." *Id.* at 74. Quoting Justice Frankfurter, the Court reasoned that banning commercial speech about a product lawful for adults, in order to protect children from exposure to the product, would surely "'burn the house to roast the pig.'" *Id.* at 74 n.27 (quoting *Butler*, 352 U.S. at 383). Similarly, in *Carey v. Population Services International*, *supra*, this Court invalidated a state statute prohibiting advertisements for contraceptives. In rejecting an argument that such advertisements "would legitimize the sexual activity" of children, the Court responded that this was "classically not [a] justificatio[n] validating the suppression of expression protected by the First Amendment." 431 U.S. at 700.

The Court repeatedly has applied this same principle to invalidate broad restrictions on indecent speech. In *Reno v. ACLU*, 521 U.S. 844 (1997), the Court relied on *Bolger* in invalidating a federal statute that severely restricted Internet indecency. *Id.* at 875. In *Denver Area Educ. Tel. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996), the Court relied on *Bolger* to invalidate a federal statute severely restricting cable broadcast indecency, despite recognizing that "[n]o provision * * * short of an absolute ban, can offer certain protection against assault by a determined child." *Id.* at 759. And in *Sable*

Communications of California, Inc. v. FCC, 492 U.S. 115 (1989), the Court relied on *Bolger* to invalidate a federal statute prohibiting indecent telephone communications, despite recognizing that restrictions short of a ban would permit "the most enterprising and disobedient young people to secure access to such messages." *Id.* at 128.

The decision below conflicts with these precedents. In this case, the First Circuit rejected petitioners' contention that commercial speech restrictions cannot "deny communication to a large number of adults for the sake of protecting children." App., *infra*, 34a. The court of appeals reasoned that this principle applies only to what it termed "expressive" speech, but not to "commercial" speech. *Id.* That analysis conflicts with the square holdings of *Bolger* and *Carey* (which involved commercial speech) and with the logic of this Court's recent indecency cases (which routinely have quoted *Bolger* for the proposition that the government cannot "reduce the adult population to only what is fit only for children"). The court of appeals also concluded that these principles were inapposite because the advertising restrictions at issue were not "equivalent to a 'blanket ban' on speech." *Id.* Under that reasoning, *Bolger* would apply only to a complete prohibition against advertising the disfavored product, and the interest of protecting children would support an *almost*-complete prohibition against such advertising – here, one encompassing 90% of the relevant area. In sum, *Bolger* and its progeny would be virtually a dead letter in the very commercial speech context in which that case was decided.[11]

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[11] Even apart from its evisceration of *Bolger*, the court of appeals grossly misapplied the narrow tailoring requirement of *Central Hudson*. For example, the court concluded that the 1,000-foot radius was not overbroad even though it would foreclose outdoor tobacco advertising in up to 90% of the largest metropolitan areas in the State. App., *infra*, 30a. The court reasoned that Massachusetts could permissibly adopt the same radius selected in a purported FDA rulemaking (*id.* at 31a), but the incorporation of an FDA standard hardly insulates that standard from First Amendment scrutiny. Indeed, in recent years this Court twice has unanimously invalidated advertising restrictions imposed by federal *statutes*. *See Greater*

The First Circuit's tailoring analysis thus has implications far beyond tobacco advertising. By eviscerating *Bolger* and its progeny, the decision below permits a near-total ban on the advertising of *any* product – ranging from tobacco to gambling to alcohol – that is lawful and appropriate for adults but not for children. Not only would the adult population be reduced to seeing "only what is fit only for children," *Bolger*, 463 U.S. at 73, but the interest in protecting children from such products would, in effect, give rise to a broadly applicable "vice exception" to the commercial speech doctrine. This Court squarely has held that there is no such exception for dangerous or adult-only products, *see Coors*, 514 U.S. at 482 n.2, and the Court should reject the First Circuit's attempt to create such an exception through its repudiation of *Bolger* and its transparent manipulation of the narrow tailoring requirements of *Central Hudson*.

New Orleans Broadcasting, *supra*; *Coors*, *supra*. If courts may engage in vigorous First Amendment review of congressional restrictions on commercial speech, then they also may do so for restrictions imposed by federal or state administrative action, to say nothing of restrictions imposed by a federal agency that was later held to lack jurisdiction over the very product at issue, *see FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). The court further reasoned that a 1,000-foot radius must be permissible because some of these petitioners previously had agreed to refrain from *billboard* advertising within a *500-foot* radius of schools. App., *infra*, 31a. But doubling the radius at issue causes the associated area to increase *fourfold*; accordingly, if a 1,000-foot radius would foreclose advertising across 90% of a metropolitan area, a 500-foot radius might only foreclose advertising in less than 22% of the same area. And if a coverage extension from 22% to 90% can be blithely dismissed as "splitting hairs," *id.*, then the concept of narrow tailoring has lost all meaning.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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